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## THE NORTH ATLANTIC COAST FISHERIES ARBITRATION.

The Arbitral Tribunal of the Permanent Court at The Hague, by its award of the 7th of last September, in the case of the North Atlantic Coast Fisheries brought to a close a controversy, which in its various phases has been an almost constant source of vexatious dispute between the United States and Great Britain for the past seventy years.

A treaty, granting exceptional rights, such as that which this Tribunal was called upon to consider, is peculiarly susceptible to different interpretations as the course of time brings new conditions not contemplated by its negotiators. The relations of the parties are changed. A liberty, which at the date of the treaty was considered indispensable, may become worthless, while one, which was deemed insignificant, may in years assume a place of vital importance to the beneficiaries under the grant. This change of conditions and of the value of rights has been especially true of the liberties acquired by the United States for its inhabitants under the first article of the Treaty of October 20, 1818.

For two hundred years after the opening of the 16th century, when Europeans began to frequent regularly the great fishing banks near the island of Newfoundland and to use its harbors for refuge and for obtaining bait, and its shores for curing and drying codfish, the methods of conducting the fisheries changed but little. By the close of that century the British and French had substantially monopolized the industry. In 1713 France by the Treaty of Utrecht acknowledged British sovereignty over Newfoundland, which up to that time had been the common resort of fishermen irrespective of their nationalities. In that treaty, however, it was agreed that French fishermen might use the shores of the northern portions of the island for curing and drying their fish, as they had been accustomed to do for a hundred years. The rights thus secured by France continued until 1904, when through reciprocal concessions Great Britain obtained their surrender.

During the negotiations of 1782, which brought to an end the war for American Independence, the commissioners of the United States insisted upon and obtained certain rights of fishery and of use of the British American shores in connection therewith, which as British subjects the fishermen of New England had enjoyed for a century. By the Provisional Articles of Peace, which in 1783 were included in the Definitive Treaty of Peace, the shores of practically all the British possessions were open to Americans for the purpose of drying fish, except those of the island of Newfoundland, while they were permitted to take fish in all the coastal waters.

Until the outbreak of the War of 1812 the New England vessels availed themselves of these privileges. With the renewal of peaceful relations the British Government took the position that the war had abrogated the fishery article of the Treaty of 1783. To this claim the United States entered a vigorous protest, and a diplomatic controversy followed, which lasted for three years, until the two Governments finally agreed to submit their differences as to the fisheries to commissioners, who were to meet in London in 1818 to negotiate a commercial treaty in place of one, which would expire by limitation in 1819.

The result of these negotiations was the Treaty of London,

which was signed on October 20, 1818. Article I of that treaty relates to the fisheries and reads as follows:<sup>1</sup>

Whereas, differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof, to take, dry and cure Fish on Certain Coasts, Bays, Harbours and Creeks of His Britannic Majesty's Dominions in America.

*Fishing Liberty.*

It is agreed between the High Contracting Parties, that the inhabitants of the said United States shall have forever, in common with the Subjects of His Britannic Majesty, the Liberty to take Fish of every kind on that part of the Southern Coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the Western and Northern Coast of Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the Coasts, Bays, Harbours, and Creeks from Mount Joli on the Southern Coast of Labrador, to and through the Straits of Belleisle and thence Northwardly indefinitely along the Coast, without prejudice, however, to any of the exclusive Rights of the Hudson Bay Company;

*Drying and Curing Liberties.*

And that the American Fishermen shall also have liberty forever, to dry and cure Fish in any of the unsettled Bays, Harbours and Creeks of the Southern part of the Coast of Newfoundland hereabove described, and of the Coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said Fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground.

*Remunciatory Clause.*

And the United States hereby renounce forever, any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure Fish on, or within three marine miles of any of the Coasts, Bays, Creeks, or Harbours of His Britannic Majesty's Dominions in America not included within the above-mentioned limits; provided, however, that the American Fishermen shall be admitted to enter such Bays or Harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other pur-

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<sup>1</sup>The Article is printed here in paragraphs with headings, but neither appear in the original.

pose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying or curing Fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.

This is the article, which the Tribunal at The Hague was asked to interpret.

There were marked differences in the provisions of this article and those of Article III of the Treaty of 1783. Under the latter American fishermen had had the right to dry and cure fish on the shores of Nova Scotia (then including the present Province of New Brunswick), the Magdalen Islands, and Labrador. By the new treaty this right was limited to the western part of the South Coast of Newfoundland and the coast of Labrador eastward of Mount Joli.<sup>2</sup>

Under the Treaty of 1783 Americans were entitled to take fish in the marginal waters of all the British coasts, but the Treaty of 1818 limited this right to that portion of the South Coast of Newfoundland, where Americans could use the strand, to the entire West Coast of that island, to the shores of the Magdalen Islands and to that part of the Labrador, upon which drying and curing privileges were granted.

The changes, as to the localities in which the rights of taking, drying, and curing fish were to be enjoyed by inhabitants of the United States, were due to the different conditions which prevailed along the British colonial coasts in 1783 and 1818. When the first treaty was signed, Nova Scotia had a small scattered population but little affected by the participation of the Americans in their coast fisheries. In 1818 the province was growing rapidly, ports and villages had sprung up in many of the numerous harbors which indented its coasts, and the inhabitants of these settlements had come to a realization of the commercial importance of their local fisheries and were jealous of the constantly increasing number of vessels from New England which frequented the inland waters of the province.

On the other hand the South and West Coasts of New-

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<sup>2</sup> *Mount Joli* does not appear on the modern maps. It is a small hill on the Labrador coast at a point almost due north from the eastern extremity of the island of Anticosti in the Gulf of St. Lawrence.

foundland, the Magdalens, and the Labrador were unsettled in 1818, and no local interests were affected by the treaty liberties acquired by the United States in the waters and on the strand of those coasts.

The error of the negotiators at London was the assumption that the conditions, which existed in 1818, would remain forever the same, or that the changes would be of such a nature as to affect but little the respective interests of the parties to the treaty. They appear to have proceeded under the belief that the British policy of discouraging settlements in Newfoundland—a policy two centuries old—would never be changed; that the island would continue to be, as it had been for so long, a convenient base of operation for British fishermen and without a fleet of its own; that the codfishery would remain the one profitable branch of the fishing industry; that no means, other than curing and drying on land, would be employed in preparing the codfish for the markets; and that the monopoly of colonial trade by Great Britain and the prohibition of commercial intercourse with other countries would be the British policy of the future as it had been of the past.

Had this apparent assumption of the negotiators as to the unchangeable character of the conditions been correct, there would have been no Fishery Controversy and no need of an arbitration. Unfortunately for the harmony of the relations between the two countries the conditions, within a few years after the Treaty of 1818 was signed, began to undergo changes, which have continued intermittently down to the present time. As a result the attempts to apply the treaty provisions to the new conditions have caused frequent disputes between the Washington and London Governments as to the meaning of the language of the treaty, which have filled volumes with diplomatic correspondence and produced such bitter feeling between the United States and the British colonies as at times to threaten their peaceful relations.

The principal changes, which took place, began in 1830 when Great Britain opened her colonial ports to American vessels, thereby making the presence of fishing vessels of the United States in the British harbors under the privileges granted by

the treaty an opportunity for smuggling. A few years later the rapidly growing Province of Nova Scotia, whose fishing industry had become one of its chief resources, adopted and enforced laws of a most stringent character against American fishermen entering the bays, harbors, and creeks along its coasts. Shortly after the middle of the century the ban of non-settlement in Newfoundland was entirely removed, self-government was established, and the fisheries became a matter of concern as the chief source of colonial wealth, with the result that the St. John's fishing interests viewed with increasing disfavor the American and French fishermen who resorted to the coasts of the island to enjoy their treaty rights. Meanwhile there had developed along the continental coast an extensive mackerel fishery, which was carried on largely in the great bays, where the Americans came in direct competition with the local fishermen. A similar change as to the species of fish sought took place on the West Coast of Newfoundland between 1850 and 1860, when herring began to be taken for commercial purposes as well as for bait, a branch of the industry, which has grown to such an extent in late years that the chief value of American treaty rights today in Newfoundland waters is the so-called "winter herring fishery" carried on in the bays and inlets of that coast. At the same time the use of ice for packing fish has rendered the liberty of landing on the shores for curing and drying of little value, while improved apparatus and methods have supplanted those employed in 1818, and materially changed the way in which the industry is conducted.

A variety of causes have thus affected the relations between the parties and the interests involved. The result has been that for seventy years a state of irritation has prevailed, which the two governments have vainly sought to remove through diplomatic channels. In 1854 and 1871 reciprocity treaties were signed, which for a period of ten years in each case, stopped discussion and dispute, but with the expiration of each treaty the controversy was renewed. An attempt was made in 1888 to make a new treaty meeting the conditions then existing, but the Senate of the United States refused its consent. From that time to the present, however, the treaty privileges on the Cana-

dian coasts have been satisfactorily extended by a system of licenses, so that no difficulties have arisen between the United States and the Dominion as to the fisheries.

In 1892 the importance of the herring fishery to American fishermen, together with their desire to purchase bait for the codfishery from the local fishermen of Newfoundland, awakened the colonial government to the opportunity to secure trade privileges in exchange for admitting American fishermen to waters not opened to them by the Treaty of 1818 and granting them permission to purchase bait. In accordance with this idea the Blaine-Bond Treaty was negotiated, which failed of ratification through the opposition of the Canadian Government. The fact that the failure of the treaty was not due to the United States caused Newfoundland to feel friendly to the latter and licenses were issued to Americans granting them extra-treaty privileges.

In 1902 another effort was made to come to a reciprocal agreement resulting in the Hay-Bond Treaty, which, however, failed to secure senatorial consent. After waiting two years in the hope that the United States would ratify the treaty and there being no prospect that the Senate would recede from its position, the Newfoundland Government reversed its attitude toward American fishermen, refused them licenses, and by hostile legislation began a course of retaliation. With the avowed purpose of restricting Americans to the bare rights, which a strict construction of the treaty would give, regulations were adopted as to the days and hours of fishing and manner of taking fish, which appeared to the United States to be discriminatory against its fishermen and in favor of the local fishermen. The colonial assembly also passed an act prohibiting the employment of Newfoundlanders on foreign vessels in treaty waters, a practice which had been pursued for years by Americans to the mutual benefit of employer and employee. American vessels were also compelled to enter and clear at custom-houses, although only a few were located on the treaty coasts, and to pay light, harbor, and customs dues. In every way the enjoyment by inhabitants of the United States of their liberties in treaty waters was embarrassed by petty requirements,

and every obstacle, which with color of legality could be imposed by legislative or executive acts, was placed in the way of the successful prosecution of the American fishery on the Newfoundland coasts.

While much may be said in defense of this policy of the colonial government, since they possessed no resource other than their fisheries which could be bartered for trade privileges, the extent, to which retaliation was carried, was, from the point of view of the United States, in flagrant violation of treaty obligations, and would, if continued, practically destroy the American herring fishery on the West Coast and cause serious loss to those whose capital was invested in that industry. The Department of State immediately took up the subject with the British Government, and a long and exhaustive discussion followed, which finally, at the suggestion of the United States, resulted in the arbitration which has just been concluded.

The preceding general review of the controversies, which have arisen as to American fishing liberties and privileges on the British colonial coasts, is essential to an understanding of the real points at issue between the two governments, and of the practical results of the award made by the Tribunal at The Hague.

The success or failure of a case before an international court should be measured, not by the acceptance or rejection by the arbitrators of a particular contention, but by the effect which their decision will have upon the interests at stake. An adverse determination of a legal proposition, which in no way curtails the exercise or value of rights claimed by the party advancing the proposition may be a technical defeat and at the same time a substantial victory. It is, therefore, from its practical effect that the award of a tribunal of arbitration must be viewed in reaching a true valuation of its provisions in regard to the specific subject of the litigation. On the other hand, the declaration of a legal principle and its application may have an entirely different value viewed generally from the standpoint of international law. It may be purely technical and ineffective as to the case at bar, but of great importance to existing relations between nations or to cases which may arise in the future.



Bearing in mind the two ways in which the results of an arbitration should be measured, a more just appreciation will be obtained of the award in the North Atlantic Coast Fisheries Arbitration.

Pursuant to the General Arbitration Treaty of April 4, 1908, the United States and Great Britain signed, on January 27, 1909, a Special Agreement submitting to five arbitrators seven questions relating to the true intent and meaning of Article I of the Treaty of 1818. The arbitrators, according to the agreement, were selected from the members of the Permanent Court at The Hague, and were Dr. H. Lammasch of Austria (president of the Tribunal), Dr. A. F. de Savornin Lohman of Holland, Dr. Luis M. Drago of the Argentine Republic, Hon. George Gray of the United States Circuit Court, and Sir Charles Fitzpatrick, the Chief Justice of Canada. The seven questions submitted to these distinguished jurists were as follows:

*Question 1.* To what extent are the following contentions or either of them justified?

It is contended on the part of Great Britain that the exercise of the liberty to take fish referred to in the said Article, which the inhabitants of the United States have forever in common with the subjects of His Britannic Majesty, is subject, without the consent of the United States, to reasonable regulation by Great Britain, Canada, or Newfoundland in the form of municipal laws, ordinances, or rules, as, for example, to regulations in respect of (1) the hours, days or seasons when fish may be taken on the treaty coasts; (2) the method, means, and implements to be used in the taking of fish or in the carrying on of fishing operations on such coasts; (3) any other matters of a similar character relating to fishing; such regulations being reasonable, as being, for instance—

(a) Appropriate or necessary for the protection and preservation of such fisheries and the exercise of the rights of British subjects therein and of the liberty which by the said Article I the inhabitants of the United States have therein in common with British subjects;

(b) Desirable on grounds of public order and morals;

(c) Equitable and fair as between local fishermen and the inhabitants of the United States exercising the said treaty liberty

and not so framed as to give unfairly an advantage to the former over the latter class.

It is contended on the part of the United States that the exercise of such liberty is not subject to limitations or restraints by Great Britain, Canada, or Newfoundland in the form of municipal laws, ordinances, or regulations in respect of (1) the hours, days, or seasons when the inhabitants of the United States may take fish on the treaty coasts, or (2) the method, means, and implements used by them in taking fish or in carrying on fishing operations on such coasts, or (3) any other limitations or restraints of similar character—

(a) Unless they are appropriate and necessary for the protection and preservation of the common rights in such fisheries and the exercise thereof; and

(b) Unless they are reasonable in themselves and fair as between local fishermen and fishermen coming from the United States, and not so framed as to give an advantage to the former over the latter class; and

(c) Unless their appropriateness, necessity, reasonableness, and fairness be determined by the United States and Great Britain by common accord and the United States concurs in their enforcement.

*Question 2.* Have the inhabitants of the United States, while exercising the liberties referred to in said Article, a right to employ as members of the fishing crews of their vessels persons not inhabitants of the United States?

*Question 3.* Can the exercise by the inhabitants of the United States of the liberties referred to in the said Article be subjected, without the consent of the United States, to the requirements of entry or report at custom-houses or the payment of light or harbour or other dues, or to any other similar requirement or condition or exaction?

*Question 4.* Under the provision of the said Article that the American fishermen shall be admitted to enter certain bays or harbours for shelter, repairs, wood, or water, and for no other purpose whatever, but that they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein or in any other manner whatever abusing the privileges thereby reserved to them, is it permissible to impose restrictions making the exercise of such privileges conditional

upon the payment of light or harbour or other dues, or entering or reporting at custom-houses or any similar conditions?

*Question 5.* From where must be measured the "three marine miles of any of the coasts, bays, creeks, or harbours" referred to in the said Article?

*Question 6.* Have the inhabitants of the United States the liberty under the said Article or otherwise to take fish in the bays, harbours, and creeks on that part of the southern coast of Newfoundland which extends from Cape Ray to Rameau Islands, or on the western and northern coasts of Newfoundland from Cape Ray to Quirpon Islands, or on the Magdalen Islands?

*Question 7.* Are the inhabitants of the United States whose vessels resort to the treaty coasts for the purpose of exercising the liberties referred to in Article I of the treaty of 1818 entitled to have for those vessels, when duly authorized by the United States in that behalf, the commercial privileges on the treaty coasts accorded by agreement or otherwise to United States trading-vessels generally?

Incidentally it should be stated that the Arbitrators were required by the Special Agreement to understand English, and all the proceedings including the oral arguments of counsel were in that language.

Question One, which related to the right of regulation in treaty waters, the issue of most immediate importance, and Question Five submitting the meaning of the word "bays" in the treaty, which had been so prominent during half a century of controversy, but which had been almost forgotten for twenty years, involved two general principles of international law. Questions Two and Six asked the Tribunal to decide as to the exact meaning of two phrases in the treaty. Questions Three, Four, and Seven raised issues as to the intent of the parties at the time the treaty was negotiated. From the point of view of international law Questions One and Five are of special interest.

#### QUESTION ONE.

The form, in which the right of regulation was submitted to the Tribunal by Question One, is exceptional in international

arbitration. In place of asking the broad question, Has Great Britain the right, without the consent of the United States, to regulate the fishermen of both nations in their enjoyment of the common fishery? the submission was made by presenting to the Tribunal the respective contentions of the parties and asking it to determine to what extent either the one or the other was justified. This method of submission had a decided effect upon the award, since it was substantially agreed that the only regulations, which could be justly enforced in the treaty waters, must be in their nature reasonable in themselves and fair as between local fishermen and those coming from the United States. In the British statement it was contended that Great Britain, Canada, and Newfoundland had the right of subjecting the common fishery to reasonable regulations without securing the consent of the United States to such regulations. The United States, on the other hand, contended that the "appropriateness, necessity, reasonableness, and fairness" of regulations must be determined by the United States and Great Britain by common accord, and that the United States must concur in their enforcement.

It is manifest that the *reasonableness* of regulations, as well as their fairness, lacks an absolute standard by which legislative and executive acts can be certainly measured. The determination as to reasonableness would rest wholly with Great Britain provided her contention in Question One had been sustained, or with the United States provided its contention had prevailed, although in the latter case the power to initiate fishery legislation would have remained with Great Britain. The real question, therefore, was reduced to this, Who should be the judge as to whether regulations were or were not reasonable?

Great Britain included in the idea of reasonableness the qualities of appropriateness, necessity, and fairness, while the United States treated them as distinct, but throughout the oral argument the word "reasonableness" was used as comprehensive of the other three.

The fisheries, which were to be subject to regulation, being in waters, over which the territorial jurisdiction of Great Britain normally extended, the burden fell upon the United

States to establish the proposition that the full exercise of this jurisdictional right had been voluntarily restricted by Great Britain in the Treaty of 1818. Such restriction could arise in one of two ways, either by an actual transfer by Great Britain of a portion of her sovereign rights over the coastal waters defined in the treaty, or by an obligation on her part to refrain from the exercise of sovereignty in so far as such exercise would restrict in any way the enjoyment by inhabitants of the United States of their fishing liberties in those waters.

The United States in its printed and oral arguments advanced both of these theories as possible under the terms of the treaty. The first, based upon a transfer of sovereign rights, required a full discussion of the doctrine of international servitudes, together with the collateral subjects of the nature of sovereignty, of *dominium* and *imperium*, of the distinction between the real and personal character of rights over coastal waters, and of the nature of rights acquired in a common fishery.

The printed argument of the United States showed that the conception of an international servitude had its origin in the Roman law, and it discussed at length the nature and extent of the right supporting its position by citations from the leading international publicists of the world, extracts from whose works were later read upon the oral argument. Among these authorities special reliance was placed upon the treatises of Clauss, Kluber, Riviere, Von Neumann, Pradier-Fodéré, and Von Ullmann. It was asserted that the three essentials of an international servitude are "(1) that it be created by one state for the benefit of another; (2) that its permanency must be beyond the control of the State by which it is created; (3) that it make the territory or a part of the territory of one State serve a purpose or an interest of another State." The argument then proceeded to demonstrate that "all these essentials are present in the grant to the United States by Great Britain of the fishery right, made by the Treaty of 1818."

In the oral argument this branch of the contention of the United States was exhaustively discussed by former Senator Turner in his opening address. The words of every international writer of authority, both past and present, were searched,

and their opinions and declarations were laid before the Tribunal with all the talent and ingenuity, of which the distinguished advocate is a master. It was a complete and consistent presentation of the theory and its application.

In meeting this position of the United States the counsel, who represented Great Britain, argued that an international servitude could only be created by an express grant of sovereign rights in terms which left no doubt of the intention of the grantor; that the Treaty of 1818 did not make such a grant; that in an international servitude there must be a dominant territory and a servient territory, while in this case not the territory but the inhabitants of the United States were benefitted, and, therefore, the right vested upon *imperium* and not upon *dominium*, was personal rather than real, and could not be classed as a servitude since that was essentially a real right. They also emphasized the general rule that any grant of this nature must be strictly construed, the presumption being in favor of the grantor's retention of all rights not specifically conveyed to the grantee. They argued that the conveyance of a liberty of fishery was always on the assumption that it was subject to regulation by the territorial sovereign, and that in the present case, since the liberty was to be enjoyed "in common with the subjects of His Britannic Majesty" and no exception from regulation by the sovereign authority was expressed in the treaty, the inference was that no such exception was contemplated by the parties, the right to regulate remaining wholly in the British Crown.

Space will not permit a more detailed examination of the arguments advanced and the authorities discussed by counsel, who occupied many sessions of the Tribunal upon this important and interesting subject. We must pass them by and consider the findings of the Arbitrators upon this feature of the argument.

The award, after a preliminary declaration that, since "the right to regulate the liberties conferred by the Treaty of 1818 is an attribute of sovereignty, unless the contrary be provided" the burden of establishing its contention was upon the United

States, took up in detail the various points urged by the United States in support of its position.

The claim that the grant to the United States constituted an international servitude was rejected by the Tribunal. The principal grounds stated for this decision are as follows: (1) Because the doctrine was one, with which neither American nor British statesmen were familiar in 1818. (2) Because a servitude in international law predicates an express grant of a sovereign right, and involves an analogy to the relation of *praedium dominans* and *praedium serviens*, whereas by the Treaty of 1818 one State grants to the inhabitants of another State a liberty to fish, which is not a sovereign right but a purely economic right. (3) Because the servitude doctrine originated in the peculiar and now obsolete conditions which prevailed in the Holy Roman Empire, wherein the rights partook more of the character of *dominium* than of *imperium*, and lacked the essentials of a modern State, full sovereignty and independence. (4) Because the doctrine is but little suited to the principle of sovereignty prevailing under a constitutional government, and has found little, if any, support from modern publicists, and a finding, except on express evidence, in favor of a servitude would not be in the general interest of the community of nations. (5) Because the fishery, to which inhabitants of the United States were admitted, was, at the time of the grant, a regulated fishery as shown by the numerous acts cited. (6) Because the words "in common with British Subjects" (*sic*) tend to confirm the opinion that inhabitants of the United States were admitted to a regulated fishery.

The reasons thus stated for the award of the Tribunal cannot but have a decided effect upon international law in their tendency to eliminate the doctrine of servitudes, as it has been previously understood and advocated by a large body of writers upon the subject. In this particular the decision of the Arbitrators is far-reaching and of general importance. The recent trend of opinion among publicists has been away from this type of limitation upon sovereignty, and the award will, therefore, be received by them with satisfaction. How far it will be accepted by those, who advocate the doctrine and give pre-

eminence in international law to the principles which developed in the relations between the States of Germany, remains to be seen.

The alternative contention of the United States was that, in case an international servitude did not exist, Great Britain had, nevertheless, obligated herself to refrain from exercising certain sovereign rights in treaty waters to the extent of putting in force no regulations unless they were reasonable; that, although Great Britain possessed the right of territorial jurisdiction over those waters, there was established by the treaty a line beyond which the legislative and executive authority of Great Britain and her colonies could not go without violating the treaty; that the determination of what was reasonable regulation, which fixed the line, was a matter of opinion and judgment; that neither Great Britain nor a British colony was competent to act as sole judge of reasonableness, because they would be undoubtedly influenced by a natural inclination to give an advantage to their own nationals and be swayed by local interest and prejudice; and, therefore, in equity to the fishermen of both nations there should be an agreement between the United States and Great Britain as to the reasonableness of a regulation before it was put in force, and, furthermore, since such mutuality was the only possible security to Americans from unjust restraint, it must be implied in the treaty grant.

It is evident that by this course of argument the same goal would be reached, which was sought in the contention as to an international servitude, namely, that regulations adopted by Great Britain or Newfoundland should be subjected to the scrutiny and approval of the United States before they could be made operative against American fishermen in treaty waters.

This feature of the United States contention was especially urged by Senator Root in his argument which closed the proceedings at The Hague. His forceful presentation of the evidence establishing the unfitness of Great Britain or Newfoundland to be the sole judge of reasonableness, and the logic of his argument that there was a line of limitation to British authority dependent upon the determination of such reasonableness made a strong impression in favor of the justness of the claim



of the United States, and undoubtedly influenced the Tribunal in its decision, which, although it specifically rejected the contention, adopted its practical features but upon other grounds.

The chief reasons for rejecting this particular line of argument are stated in the award to be: (1) Because every State is bound to execute the obligations of a treaty *bona fide*, and no reason has been shown why this treaty differs from other treaties by which a State admits foreigners on its territory. (2) Because the exercise of a right of consent by the United States would predicate an abandonment by Great Britain of her independence to that extent, which has not been proved. (3) Because "a line which would limit the exercise of sovereignty of a State within the limits of its own territory can be drawn only upon the ground of express stipulation, and not by stipulations concerning a different subject-matter." (4) Because the question, which arises, is whether the treaty contains an abdication by Great Britain of her sovereign right to regulate the fisheries, and there are no words contained in the treaty to justify the assumption that such sovereignty over its territory was in any way affected or any part of it was transferred to the United States. (5) Because to hold that the United States has a voice in fishery regulation involves the recognition of a right to participate in the internal legislation of Great Britain and her colonies, and to that extent would reduce them to a state of dependence.

It is evident that the Tribunal, in passing upon this contention, was as determined as it had been in dealing with the subject of an international servitude to uphold the complete sovereignty and independence of Great Britain within her own territory, unless her sovereign and independent powers were limited in affirmative and unequivocal terms by express stipulation.

From the view-point of the modern concept of sovereignty this attitude of the Arbitrators will meet with general approval. Moral obligation and national honor, as the binding qualities of treaties, and good faith in the performance of treaty stipulations are recognized today as the natural and proper restrictions upon the powers of an independent State in its interna-

tional relations. To impose greater restraints, save by the voluntary act of the sovereign power, would be an invasion of a State's independence out of harmony with the present-day idea of the integrity of sovereignty and the equality of nations.

The force of the argument of the United States, in spite of the fact that it was rejected by the Tribunal, influenced the British counsel to assume a position, which they doubtless would not have done except that they feared the American contentions might be sustained. Sir Robert Finlay in the opening argument on behalf of Great Britain conceded, as he was forced to do by the British submission of the question, that the right of Great Britain to regulate was limited to reasonable regulations, and that the United States could properly raise the question of reasonableness through the channel of diplomacy. But he went further than that, for he admitted that Great Britain was not entitled to be the sole judge of what regulations were or were not reasonable. The importance of this admission to the United States is evident.

The Tribunal gave to Sir Robert Finlay's words and to the terms of the British statement in Question One their full value. The award says:

While therefore unable to concede the claim of the United States as based on the Treaty, this Tribunal considers that such claim has been and is to some extent, conceded in the relations now existing between the two Parties. Whatever may have been the situation under the Treaty of 1818 standing alone, the exercise of the right of regulation inherent in Great Britain has been, and is, limited by the repeated recognition of the obligations already referred to, by the limitations and liabilities accepted in the Special Agreement, by the unequivocal position assumed by Great Britain in the presentation of its case before this Tribunal, and by the consequent view of this Tribunal that it would be consistent with all the circumstances, as revealed by this record, as to the duty of Great Britain, that she should submit the reasonableness of any future regulation to such an impartial arbitral test, affording full opportunity therefor, as is hereafter recommended under the authority of Article IV of the Special Agreement, whenever the reasonableness of any regulation is objected to or challenged by the United States in the manner, and within the time hereinafter specified in the said recommendation.

Thus the contention of the United States that neither Great

Britain nor Newfoundland ought to be the sole judge of the reasonableness of regulations was technically rejected, but in fact sustained.

In accordance with its decision the Tribunal, acting under Article III of the Special Agreement, which became operative through the formal request of the United States, instituted a mixed commission of experts, consisting of a national of each party and a non-national named in the award, to pass upon the reasonableness of the existing fishery regulations applicable to Americans in treaty waters.

It was also recommended, pursuant to Article IV of the Agreement, that all future laws, ordinances, and rules for the regulation of the fisheries before going into effect should be published in the official gazette of Great Britain or of the colony enacting the law for the period of two months; that, in case the Government of the United States should consider any such regulations to be inconsistent with its treaty rights, it could notify the British Government to that effect within the two months; that such objectionable regulations should not be enforced against inhabitants of the United States until their reasonableness was passed upon by a Permanent Mixed Fishery Commission, which within five months from the submission of the regulations to it must render its decision. Thus, if the full periods of time were taken, a regulation objected to would be suspended for seven months. The Commission is to be composed of two nationals, and a non-national umpire, each appointed for terms of five years.

The Tribunal has thus provided that present and future regulations, objectionable to the United States, shall be submitted to an impartial court of experts, who shall pass upon their appropriateness, reasonableness, necessity and fairness; and they have further provided a time, during which the regulations shall be held in abeyance, long enough for American fishermen to obtain full notice of the possible change and to arrange their affairs accordingly.

In fact the rights of inhabitants of the United States can no longer be impaired by unfair or unreasonable legislation, nor can their interests be threatened by sudden changes in the regulations.

The relief, which the Government of the United States desired and which its counsel sought, was obtained.

While the Tribunal declared the sovereignty of Great Britain to be complete over the fisheries, it so effectually limited its exercise that the treaty rights of the United States are as fully protected as if the American contentions had been sustained. Great Britain won a technical victory upon the law, but the United States, from an industrial standpoint, won a far more valuable and substantial one upon the facts.

#### QUESTION FIVE.

The next question to demand attention, because of the principles of international law discussed in its presentation to the Tribunal, is Question Five. It relates to the meaning and interpretation of the word "bays" in the so-called "renunciatory clause" of the treaty, which reads as follows:

And the United States hereby renounce forever, any Liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure Fish on, or within three marine miles of any of the Coasts, Bays, Creeks or Harbours of His Britannic Majesty's Dominions in America not included within the above-mentioned limits; provided, however, that the American Fishermen shall be admitted to enter such Bays or Harbours for the purpose of Shelter and of repairing Damages therein, of purchasing Wood, and of obtaining Water, and for no other purpose whatever. But they shall be under such Restrictions as may be necessary to prevent their taking, drying or curing Fish therein, or in any other manner whatever abusing the Privileges hereby reserved to them.

Question Five asks: "From where must be measured the three marine miles of any of the coasts, bays, creeks or harbours referred to in the said Article?"

About 1840 the Nova Scotian authorities in their efforts to debar the Americans from the coast fisheries advanced the claim that the three miles from "bays, creeks or harbours" should be measured from a line drawn across the entrances of these indentations from headland to headland irrespective of the distance. The intention was to keep the United States fishermen out of the large bays, particularly the Bay of Fundy, which they frequented in search of cod and mackerel. This claim of Nova Scotia formed

the "headland theory" made famous by the discussions which it aroused. From 1840 to 1888 the diplomatic correspondence between the United States and Great Britain is filled with arguments for and against the theory; in the Houses of Congress, the Assembly of Nova Scotia, and the Canadian Parliament it was the subject of frequent and prolonged debates; and numerous articles upon the question appeared in the current literature of the periods when the controversy became especially bitter.

The main argument advanced by the opponents of the theory was that the bays, to which the treaty referred, were those that would fall within the territorial jurisdiction of Great Britain by drawing a line three marine miles seaward from low-water mark following the windings of the shore. When such line did not enter a bay, such body of water, which necessarily could not exceed six miles in width, was manifestly a bay of "His Britannic Majesty's Dominions in America," and a line drawn across its entrance formed the line from which the three miles should be measured.

Although the British Government insisted, throughout the half-century of controversy, that no such limitation as to the character of bays was intended by the negotiators of the treaty, they ordered their naval vessels not to interfere with American fishermen when the latter were more than three miles from land, and they induced the colonial governments to adopt a similar course. In only two cases were fishing vessels of the United States molested beyond three miles from the shore, the *Washington* in 1843, and the *Argus* in 1844. Both vessels were seized and condemned by the authorities of Nova Scotia. The United States Government filed claims for these seizures with the Mixed Commission of 1854, and in each case the claim was allowed and a substantial indemnity awarded.

The seizure in 1843 took place in the Bay of Fundy, and the British Government, after two years of diplomatic discussion, and in spite of Nova Scotia's protest, announced that they would relax their construction of the treaty so far as that bay was concerned, reserving, however, all the rights which they claimed. This relaxation has continued since that time, and, in an exchange of notes between the two governments, following the signature of the

Special Agreement of 1909, any question regarding the Bay of Fundy was withdrawn from the consideration of the Arbitrators. This is in effect a permanent arrangement in favor of American fishermen.

As has been said, the controversy as to bays ceased in 1888, when the present policy of the Dominion Government of granting licenses went into force. That Government for some reason, probably because of its former importance, asked and obtained the insertion of Question Five in the Special Agreement.

The "bay question" from its historic interest and from the familiarity with it, which had resulted from its frequent discussion, acquired an undue prominence in the eyes of the public. The fact is, measured by its industrial value, Question Five was the least important of the seven questions decided at The Hague. For a quarter of a century American fishing vessels have seldom visited any of the large bays along the non-treaty coasts, except the Bay of Fundy which is exempt from the award. Furthermore, the Tribunal, instead of laying down a fixed rule as to the extent of territorial jurisdiction over marginal seas, declared that nations, as well as publicists and jurists, have reached no definite agreement upon the subject, and that it was unable to establish a new principle for this arbitration. The importance of the award from an international point of view is, in a measure, lessened by this ruling. The interest in Question Five, in the matter of legal principle, lies, therefore, in the arguments of counsel rather than in the award of the Arbitrators, for in the former the international law of sovereignty over coastal waters was invoked by both sides and fully discussed.

The contention of the United States, that bays, which did not exceed six miles in width, were the bays intended by the negotiators in 1818, rested primarily upon evidence showing that by the term, "bays, creeks or harbours of His Britannic Majesty's Dominions in America," only territorial bays were intended. It was pointed out that in the numerous diplomatic notes exchanged between the governments from 1815 to 1818 the British Government constantly used the expressions, "within the limits of the British Sovereignty," "within the British jurisdiction," "within the British limits," etc., in referring to the fisheries, from which

it was claimed American fishermen were excluded by the abrogation of their rights by the War of 1812. It was, therefore, claimed by the United States that it was fishing in British territorial waters to which Great Britain objected and which the United States renounced in 1818.

The question thus raised was, What was the limit of jurisdiction over marginal seas recognized by American and British statesmen in 1818? An array of authorities were cited to show that this limit at that time was fixed by the range of cannon from the shore, which did not then exceed three marine miles, and as a result that distance was taken arbitrarily as the line of jurisdiction. It was shown that in negotiations in 1806 between commissioners of the United States and Great Britain, who signed a treaty which failed of ratification, the general rule, as understood in both countries, was three marine miles from "shore." It was also shown that in the negotiations preceding the Treaty of 1818 "three miles from land" were frequently referred to. It was argued that, even if international usage as to the sea area, over which territorial jurisdiction extended, was uncertain in 1818—a fact, however, which was denied—the three-marine-mile limit had been fully recognized by the parties to the treaty, and that, therefore, as between them, it was settled public law and binding upon them in their intercourse; and the treaty ought for these reasons to be subjected to this accepted rule, and the intent of the negotiators judged by it. It was also pointed out that subsequent to the treaty Great Britain by her executive acts placed this interpretation upon its language even after Nova Scotia had proposed the "headland theory."

In reply to the contention of the United States the British counsel asserted that the three-mile rule applied only to "open" coasts; and that the determination of whether a bay was territorial waters or part of the high seas depended largely upon its configuration and upon the distance it extended inland, rather than upon its width at its entrance. They declared, and supported the declaration by many authorities, that whatever force there was in the argument that three marine miles from shore was the limit in 1818, it was ineffectual here since the rule did not apply to bays and does not now apply to them. In this connection they

relied upon the cases of Delaware Bay and Chesapeake Bay, over which, it was pointed out, the United States had claimed and successfully maintained jurisdiction, although each exceeded six miles in width at its entrance.

The answer of the United States to this latter argument, which was undoubtedly difficult to meet, was that, at the time the claim was made, a condition of belligerency existed, which gave to the United States extraordinary rights over those waters; and, that, in any event, other nations having acquiesced in the claim, the rights of the United States rested upon a principle entirely different from the general rule and formed an exception to it.

The argument, however, upon which Great Britain chiefly relied, was that, irrespective of the existence of the three-mile rule in 1818, the treaty, if its language was read naturally, referred to bays in general, that is, to geographical bays, without regard to their form or width, and that all bodies of water named on the maps of the period "bays, creeks or harbours," or commonly known as such, were the ones in which the United States renounced its right of fishery.

In this, her main contention, Great Britain was successful. The Tribunal in its award, after detailing the various arguments advanced by the United States and its reasons for rejecting them, stated that it was "unable to understand the term 'bays' in the renunciatory clause in other than its geographical sense, by which a bay is to be considered an indentation of the coast, bearing a configuration of a particular character easy to determine specifically, but difficult to describe generally." This expression of opinion, as a reason upon which to base a definite decision, invites critical analysis, but it would be inappropriate here.

In regard to the rule of international law, claimed by the United States as applicable to embayed waters, the Tribunal announced that, "as no principle of international law recognizes any specified relation between the concavity of the bay and the requirements for control by the territorial sovereignty, this Tribunal is unable to qualify by the application of any new principle its interpretation of the Treaty of 1818 as excluding bays in general from the strict and systematic application of the three-mile rule." This language would seem to support the position



taken by the United States, but the next paragraph of the award declared, as a reason against that position, that "the opinion of jurists and publicists quoted in the proceedings conduce to the opinion that speaking generally the three-mile rule should not be strictly applied to bays." Taken together these two declarations are interesting in showing the uncertainty of the international law upon the subject according to the views of the Arbitrators, except Dr. Drago, who dissented from the decision rendered upon this question.

However, since the Tribunal found that the word "bays" in the renunciatory clause meant geographical and not territorial bays, it was unfortunately unnecessary for them to attempt the announcement of a legal rule.

The Tribunal's answer to Question Five was: "In case of bays the three marine miles are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay. At all other places the three marine miles are to be measured following the sinuosities of the coast."

From this decision, as has been said, Dr. Drago dissented, filing a dissenting opinion, in which he said that the words "of His Britannic Majesty's Dominions in America" imported the idea of territorial possession; that for that reason the bays mentioned in the treaty must be territorial; and, therefore, the Tribunal was called upon and should have laid down a rule to determine such territoriality. He criticized the answer made by his colleagues as failing to solve the practical difficulty in that "no rule is laid out or general principle evolved for the parties to know what the nature of such configuration is or by what methods the points should be ascertained from which the bay should lose its characteristics as such."

The justness of Dr. Drago's criticism is evident; and the unsatisfactory character of the answer is substantially admitted by the other Arbitrators, for acting under a strained construction of Article IV of the Special Agreement, which authorized them to recommend to the parties "rules of procedure, under which all questions which may arise *in the future* regarding the *exercise*" of the treaty liberties (not "privileges," the word used in regard

to bays on the non-treaty coasts) might be determined "in accordance with the *principles* laid down in the award," the Arbitrators recommended that the parties agree to a series of arbitrary lines, described geographically in the award, as marking the entrances of certain bays, and that the entrance of every other bay should be where it narrows to ten miles. The lines thus proposed and the ten-mile rule are more favorable to American interests, but still very similar to those provided in the unratified Bayard-Chamberlain Treaty of 1888.

A much more serious defect than its uncertainty is to be found in the answer to Question Five, which it will be necessary also to cure by agreement between the governments. The Tribunal having failed to fix a rule as to the territoriality of bays, the question is left open as to whether or not British jurisdiction extends over the waters of bays further than three marine miles from the strand. Even if the recommendations of the Arbitrators are adopted, there is nothing in them authorizing the British or colonial authorities to exercise territorial sovereignty beyond the limits generally recognized by nations. While an American vessel might fish in a large bay in violation of the Treaty of 1818, as modified by an agreement made in accordance with the Tribunal's recommendations, it could not be seized legally by Great Britain, unless within her territorial waters. If the vessel was outside such waters, though within the bay, the violation of the treaty would be an infraction of the laws of the United States and only punishable in its municipal courts. As the two governments are as far apart to-day, as they were before the arbitration, upon the extent of territorial jurisdiction, the Tribunal has left unadjusted a question which may be fruitful of future disagreement and dispute.

The five remaining questions, although of great importance to Americans exercising their treaty liberties and privileges, are of comparatively little interest from the standpoint of international law, since they concern the interpretation of words and the determination of the intent of the parties.

#### QUESTION TWO.

Question Two, relating to the right of inhabitants of the United States, while enjoying their fishing liberties on the treaty

coasts, to employ non-inhabitants as members of the crews of their vessels, was answered affirmatively by the Tribunal. The decision was based on the grounds that the liberty to take fish is an economic right, that the exercise of an economic right includes the right to employ servants, that the Treaty of 1818 does not limit the right of employment to persons of a "distinct nationality or inhabitancy," and that "the liberty to take fish as an economic liberty refers not only to individuals doing the manual act of fishing, but also to those for whose profit the fish are taken."

The award does not, of course, debar Great Britain or her colonies from prohibiting British subjects from shipping on American vessels, but, while the acceptance of employment may be penalized, the act of American captains in engaging British subjects can no longer expose them to fines or their vessels to seizure. How far the decision will warrant the local authorities in detaining and searching an American vessel in treaty waters for the purpose of removing British members of the crew, who have accepted employment in violation of law, is a question which may hereafter arise.

#### QUESTION SIX.

The other question submitted to the Tribunal, which related to the meaning of words or phrases in the treaty—Question Six—raised an issue as to the right of inhabitants of the United States to take fish in the bays, harbors and creeks of Newfoundland treaty coasts and of the Magdalen Islands. Great Britain had never disputed this right, and from 1818 American fishermen had constantly frequented these inland waters without protest. However, in 1905, when the Newfoundland Government developed its retaliatory and hostile policy towards American fishermen, Sir Robert Bond, then premier of the colony, after searching the treaty for legal excuses to lessen or interrupt the fishing industry of the United States on the West Coast, advanced a novel theory as to the meaning of the language, in which the liberty to take fish on that coast was granted to the United States.

He pointed out that the liberty conferred upon the inhabitants of the United States was to take fish "on the Coasts, Bays, Harbours and Creeks" of Labrador, but in the grant of such

liberty in Newfoundland waters the word "coast" was used alone, the words "bays, harbours and creeks" being omitted. In the case of the Magdalen Islands "shores" took the place of "coast," and the same omission of the words "bays, harbours and creeks" occurred. He argued from these differences in the terms of the grant that the obvious intention was that, while Americans might fish along the open portions of the coasts of Newfoundland and the Magdalens, they had no right to enter the bays, harbors or creeks of those coasts except on the South Coast of Newfoundland where they had the right to do so, not to take fish, but to dry and cure on land. If this theory had been sustained, American fishermen could no longer engage in the lucrative winter herring fishery, which is carried on in the bays of the West Coast of Newfoundland, and is to-day the most valuable industry dependent upon the rights acquired by the United States in 1818.

In the diplomatic correspondence, which followed the hostile attitude of the Newfoundland Government and preceded the suggestion to arbitrate, the British Government never advanced or advocated the Bond theory. However, it was added to the questions to be answered by the Tribunal upon the request of the British Government, who were forced to take this course in order to secure Newfoundland's unwilling assent to the *modus vivendi* which was to be operative pending the settlement of the controversy.

The Tribunal in its award found, after reviewing the claims and arguments advanced by Great Britain, that "American inhabitants are entitled to fish in the bays, creeks and harbours of the treaty coasts of Newfoundland and the Magdalen Islands."

Under present conditions the importance of this decision to the fishing interests of the United States can hardly be overestimated. Had the ingenious interpretation of Sir Robert Bond been sustained, the liberties of the United States on the West Coast would have been substantially valueless.

#### QUESTIONS THREE AND FOUR.

Questions Three and Four, which relate to the right of Great Britain to require American fishing vessels to make entry and report at custom-houses, and to impose upon them customs, light,

harbor and similar dues, while they are exercising their liberties on the treaty coasts or their special privileges on the non-treaty coasts, involve the intent of the parties as to regulations of a commercial character which do not pertain to fishing but to the presence of the vessels in British waters. Such regulations, though they may not directly restrict the liberties and privileges granted, may cause delays and expenditures, which might be most burdensome upon American fishermen.

In the argument on behalf of the United States, while counsel denied the right of Great Britain to subject American vessels to any regulations of this character, they conceded that it was not unreasonable to require a fishing vessel coming from the United States to notify the local authorities of its presence on the treaty coasts, as soon after its arrival as opportunity offered, by reporting at a custom-house. To this extent alone the British claim was conceded.

Adopting this concession by the United States the Tribunal, in answering Question Three, decided:

The requirement that an American fishing vessel should report, if proper conveniences for doing so are at hand, is not unreasonable, for the reasons stated in the foregoing opinion. There should be no such requirement, however, unless there be reasonably convenient opportunity afforded to report in person or by telegraph, either at a custom-house or to a customs official.

But the exercise of the fishing liberty by the inhabitants of the United States should not be subjected to the purely commercial formalities of report, entry and clearance at a custom-house, nor to light, harbor or other dues not imposed upon Newfoundland fishermen.

In the case of American vessels entering the bays, harbors, or creeks of the non-treaty coasts in the exercise of one of the four privileges specified in the treaty, namely, for shelter or repairs, to purchase wood or obtain water, Great Britain contended that, since the treaty provided that the exercise of the privileges should be "under such restrictions as may be necessary to prevent their taking, drying or curing fish therein, or *in any other manner whatever* abusing the privileges hereby reserved to them," the vessels were properly liable to the usual regulations imposed upon vessels approaching the colonial coasts.

The United States replied to this contention that such regulations were not restrictions "necessary to prevent their taking, drying or curing fish," which were clearly the character of regulations intended, that to enforce general commercial regulations would deprive the privileges of their chief value, and that there was no warrant under the treaty for their imposition. However, as has been said, it was conceded that a report at customs, under certain conditions, was not an unreasonable requirement.

The Tribunal, in answering Question Four, "decided and awarded that such restrictions are not permissible," but it modified this broad decision, in accordance with the concession of the United States, by declaring that it would be reasonable for American fishermen, entering the colonial bays for any of the four purposes and remaining therein for more than forty-eight hours, to be required to report either in person or by telegraph at customs, "if reasonably convenient opportunity therefor is afforded."

The award upon these two questions has removed a danger of exaction and of interference, of which American fishermen have had frequent experience in the past, and which, in view of a possible hostile policy being adopted by the colonial governments, might be most burdensome in the future.

#### QUESTION SEVEN.

Question Seven related to a state of affairs which for some time has existed upon the treaty coasts. American fishing vessels sail from their home ports either under a fishing license or under register. Under the latter papers they are entitled to carry a cargo for trading purposes, but must regularly clear at customs. Under a fishing license they have no trading privilege nor are they required to take out a clearance.

To the practice of an American vessel engaging in trade on the treaty coasts and at the same time exercising the treaty liberty of taking fish, Great Britain objected on the grounds that it was the manifest intent of the negotiators of the treaty to confine the rights granted to fishing vessels as a special class, and that the presence of a registered vessel laden with goods, which claimed to be on the treaty coasts for the purpose of fishing, would result

in constant violations of the revenue laws, which it would be difficult to prove and punish.

The United States met these objections by asserting that in 1818 the British policy of monopolizing colonial trade was in force, and that no foreign vessel had the right to bring a cargo into any Newfoundland port; that, when in 1830 mutual commercial privileges were conferred by agreement between the United States and Great Britain, fishing vessels were not exempted from their enjoyment, and that there was nothing in the Treaty of 1818 which debarred fishing vessels from rights of trade subsequently acquired.

The soundness of the arguments advanced by both sides appealed to the Tribunal, and, while the decision was in favor of the United States, it was so modified as to remove as far as possible the danger of smuggling.

After a brief statement of its reasons, the Tribunal decided "that the inhabitants of the United States are so entitled in so far as concerns this treaty, there being nothing in its provisions to disentitle them, provided the treaty liberty of fishing and the commercial privileges are not exercised concurrently."

The word "concurrently" is explained in the reasoned part of the award, in which the Tribunal, after concluding that there is nothing in the treaty to prevent American vessels from being employed in the dual capacity, stated: "But they cannot at the same time and *during the same voyage* exercise their treaty rights and enjoy their commercial privileges, because treaty rights and commercial privileges are submitted to different rules, regulations and restraints." The use of the phrase "during the same voyage," taken in connection with the final answer, can have but one meaning, and to it the United States cannot justly object. The evident intention of the Tribunal was to decide that an American vessel, duly authorized to trade, might proceed laden to the treaty coasts, where, having conformed to the laws governing trading vessels and having discharged its cargo at a port of entry, it could exercise its treaty liberties with the same freedom as a vessel under a fishing license. That is, the word "voyage" in this connection does not mean the round trip, but the time occupied between departure from the home port and the discharge of cargo on the

treaty coast. No other interpretation of the answer to Question Seven would be rational.

From this review of the award of the Tribunal it is clear that, except as to Question Five, the answers to the seven questions were, from an industrial point of view, favorable to the United States. On the other hand, Great Britain preserved the technical integrity of her sovereignty over the shores and waters on which the United States had acquired special rights, and successfully resisted the attempt to partition that sovereignty under the plea that the Treaty of 1818 created an international servitude. As to Question Five, Great Britain also succeeded in establishing her contention that the word "bays" in the treaty meant *geographical* bays irrespective of their size or depth, but, in view of the Tribunal's refusal to pass upon their territoriality, this important branch of the question remains undecided, so that the historic "headland theory," from a different standpoint, may again become the subject of controversy.

The award, taken as a whole, commends itself generally, because it seems to furnish, except as to Question Five, a practical and permanent solution of the differences which have arisen in the past and which may arise in the future between the two powers who were parties to the Treaty of October 20, 1818.

The final settlement, through the application of just principles of interpretation, of a dispute, which has not infrequently during the past seventy years menaced the peaceful relations existing between the United States and Great Britain is a matter for general congratulation; and that this settlement has been received with almost universal approbation in both countries, furnishes an argument in favor of international arbitration more potent than any which can be presented in behalf of the adjustment of disputes between nations through the peaceful agency of impartial justice.

*Robert Lansing.\**

Watertown, N. Y.

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\*Mr. Lansing was in attendance at the sessions of the Arbitration Tribunal as Solicitor for the Agency. [Ed.]